STATE OF MICHIGAN

COURT OF APPEALS

FOAMADE INDUSTRIES, Plaintiff-Appellant,	UNPUBLISHED March 4, 2008
v	No. 271949 Wayne Circuit Court
VISTEON CORPORATION, Defendant-Appellee.	LC No. 05-510206-CK

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff Foamade Industries ("Foamade") appeals as of right the Wayne Circuit Court's order dismissing its claim that defendant Visteon Corporation ("Visteon") improperly charged it for the costs of product testing, which was the final order dismissing Foamade's remaining claims and closing the case. However, Foamade's arguments on appeal pertain to the trial court's May 12, 2006, order granting Visteon's motion for summary disposition and dismissing with prejudice "Foamade's claim arising from an alleged agreement between Visteon and Foamade for the 'life of the program' of certain Long Life Air Filters . . . ." We reverse and remand.

This case arises from the business relationship between Foamade and Visteon concerning an air cleaner that Foamade supplied to Visteon for use in Visteon's long-life air filters, which Ford Motor Company installed in its air induction systems used in low-emissions Ford Focus vehicles. The parties worked together to develop the long-life air filter and negotiated for several months concerning the price of supplies and other costs. On March 11, 2002, Michael Egren, Foamade's then-president,[1] sent a letter to Frederick Botero of Visteon's commodity purchasing division proposing two options for supplying filters to Visteon. The letter states in pertinent part:

> I thought we had a productive meeting on Friday. My impression is that we all agree that it makes sense to start with a smaller inventory for the low volume production and then change to the high-volume equipment when the risks justify it.

[1] Egren became CEO of Foamade in 2003.

Below are revised proposals based on my recent meetings with Foamex, and our meeting on Friday:

OPTION 1

This is an update reflecting our supplier's agreement to provide materials the first year at higher volume pricing. As we discussed, it still amortizes the low-volume equipment costs over the low-volume parts, and the high-volume equipment cost over the high-volume production.

Pricing off low-volume equipment:	$7.65 ea.
Tooling:	$21,000
Equipment capacity:	240,000/yr

If program remains at low volumes the price will reduce to $5.67 after 90,000 parts are produced, and then 3% per year for years beginning 2005 and 2006.

Pricing at implementation of high-volume line:	$5.83
3% reductions beginning years 2005, 2006, & 2007.	
Tooling:	$60,000
Equipment capacity:	1,100,000/yr

After 1,370,000 parts (off high-volume line) are shipped, the price will be reduced by an additional $.58 ea.

Therefore, the price after the 3% reductions and amortization are complete will be $4.74 ea for this project.

Note that if we start high-volume equipment earlier than 90,000 parts, we will still need to recover the unamortized amount at $1.98 ea. This can be negotiated either as a lump sum payment or spread over the high-volume pricing.

OPTION 2

This is a new option based on our meeting, and Visteon's desire to lower the price of the first year production. To accomplish this we amortized part of the cost of the low-volume equipment required, across the high volume pricing.

Pricing off low-volume equipment:	$6.07 ea.
Tooling:	$21,000
Capacity:	240,000/yr

If volume stays low, and justification for high-volume equipment doesn't exist, there can be no price reduction.

Pricing at implementation of high-volume line:	$5.98

3% reductions beginning years 2005, 2006, & 2007.

Tooling:	$60,000
Equipment capacity:	1,100,000/yr

After 1,370,000 parts (off the high-volume line) are shipped the price will be reduced by an additional $.73 ea.

Therefore, the price after the 3% reductions and amortization are complete will be $4.74 ea for this project.

Note that if we start high-volume equipment earlier than 90,000 parts, we will still need to recover the unamortized amount at $.40 ea. This can be done either by lump sum payment or spread over the high-volume pricing.

SUMMARY

The 3% price reductions assume we reasonably attain the projected volumes, and chemical costs do not increase more than 10%. Likewise, chemical cost reductions that impact our material costs will be passed on as additional savings. The dates of the 3% reductions also presume a startup around January 2003.

Projected Volumes

2003	60,000
2004	400,000
2005	400,000
2006	400,000
2007	200,000

All pricing presumes a contract for the life of the program on the Focus. We realize the volumes and project are dependent on Ford's production and plans, and that our contract is only for the volumes that Ford requires of Visteon.

* * *

I believe this proposal gets close to meeting your targets and results in minimizing risks for both of us. Please contact me when you've had a chance to review this to determine if this approach works. There are obviously some variations we could look at, but I welcome your feedback on this concept.

Botero responded by email on March 12, 2002. He wrote, "FYI, the program and I have accepted this proposal and I will be sending you a sourcing confirmation letter shortly for this part." Botero sent a sourcing confirmation letter dated March 12, 2002, to Darryl Walker, who managed Foamade's account with Visteon at this time. The letter stated in pertinent part:

Congratulations, Foamade has been selected as the supplier for the long life engine air filter program for the C170. Welcome to the program team!

> For confirmation purposes, pricing for VP3S4U-9601-AA is $7.65 (assumes expendable dunnage) FOB Auburn Hills, MI, tooling is $81,000 and minimum productivity is 3%/year for the life of the program. Price reductions based on capacity investment and amortization will be in accordance with your letter dated March 11, 2002 (option #1). This sourcing is valid assuming that Foamade and Visteon will work together on VA/VE[2] opportunities to further improve cost savings.
>
> * * *
>
> Please note that actual orders and volumes will be subject to [Ford's] releases and timing. Visteon Terms & Conditions will apply to this sourcing agreement and all subsequent commercial events.
>
> Prior to full production, a Purchase and Supply Agreement based on Visteon's standard purchase order terms and conditions will be issued which incorporates the pricing above unless either or both of the following occur:
>
> > (i) Visteon makes a change in program or subsystem/end-item component direction;
> >
> > (ii) Your company is unable to continue with design and development of the subsystem/end-item component or carry out all of the responsibilities associated with this Agreement;
>
> in which case Visteon and your company will each absorb their own cost of work for this program. . . .
>
> * * *
>
> To confirm this sourcing agreement, please sign below and return to me. Visteon Corporation looks forward to working with you on this program.[3]

Visteon issued a purchase order to Foamade on March 19, 2002, listing the cost of the air cleaner as $7.65. On April 6, 2002, Egren sent Botero an email indicating that he had reviewed the sourcing confirmation letter and "attached a marked copy showing a few changes we require to Visteon's standard terms and conditions." The attachment listed eight objections to these terms and conditions, but included no reference to Visteon's termination provision. Egren also noted in his email that, because timing was critical, the parties' focus up to that point had been on reaching an agreement on pricing, and they had not had the opportunity to "meaningfully

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[2] "VA/VE" is "value analysis [/] value engineering," which is "a process that we use to find other ways rather that just reducing the price of a component to pull cost out of that component."

[3] The parties do not indicate that a Foamade agent ever signed and returned this sourcing confirmation letter.

negotiate the global terms," which he described as "overreaching, burdensome, or inappropriate under the circumstances . . . ." On April 8, 2002, Botero replied to Egren's email and indicated that Visteon would not accept the proposed changes. Visteon later issued at least two additional purchase orders to Foamade. These purchase orders reflected changes in the price of supplies resulting from engineering changes and were not challenged by Foamade.

By March 2004, Visteon had decided to "re-source" the air cleaner business to another supplier. On April 1, 2004, Visteon issued a new purchase order, which Foamade received on April 12, 2004. This purchase order differed from the others in that the "%" column, which until that point had always read "100," now read "50." In response, Egren notified Corry Adams, a non-metals commodities buyer at Visteon, that Foamade only accepted the terms of this purchase order to the extent they were consistent with the parties' 2002 agreement. Egren stated that his response was intended to indicate his non-acceptance of the apparent reduction in the percent of business offered to Foamade as indicated by the "50%" value in the purchase order. Apparently Foamade did not receive additional purchase orders after April or May 2004 and stopped shipping air cleaners to Visteon around this time. On July 16, 2004, Egren sent an email to Adams requesting clarification of the status of the long-life air filter program. Egren did not receive a response and again emailed Adams on August 5, 2004. He reiterated his willingness to meet to resolve any problems between the parties and noted that he would take the matter up with "more senior level people at Visteon" if he did not receive a response by August 10, 2004.

Adams sent the following response to Egren's email on August 5, 2004:

> Mr. Egren,
>
> I received your original email.
>
> We have already addressed your concerns and answered your questions. Visteon had worked very hard to get Foamade to meet specific needs, and felt this had not been accomplished. As a result, we took the necessary steps to switch over to a new supplier.
>
> Regards,
>
> Corry Adams

Egren sent Adams a letter on August 20, 2004, notifying Adams that Visteon breached its agreement with Foamade and submitting its claim for damages. On April 6, 2005, Foamade initiated this cause of action, alleging breach of contract and promissory estoppel claims against Visteon. On May 12, 2006, the trial court entered an order granting Visteon's MCR 2.116(C)(10) motion for summary disposition and dismissing Foamade's breach of contract and promissory estoppel claims with prejudice.

On appeal, Foamade argues that the trial court erred when it granted Visteon's motion for summary disposition, because at a minimum a question of fact existed regarding whether the parties agreed that Visteon would purchase all the air cleaners required for the long-life air filter from Foamade for the life of the program. We agree. We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646

NW2d 455 (2002). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual support of a claim and requires this Court to consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact warranting a trial exists." *Elezovic v Ford Motor Co*, 274 Mich App 1, 5; 731 NW2d 452 (2007).

Because this dispute concerns the sale of goods, the Uniform Commercial Code—Sales ("UCC"), MCL 440.2101 *et seq.*, applies. MCL 440.2102. There is no question that the parties had an agreement under which Foamade would provide supplies for the long-life air filter to Visteon. The issue in this case concerns the terms of that agreement. To make that determination, we must first ascertain what constitutes the offer and what constitutes the acceptance.

"Because the U.C.C. does not define 'offer,' courts may look to sources such as the common law and the Restatement of Contracts for the definition." 1 Williston, Sales (5th ed), § 7:10, p 282. "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006) (internal quotations omitted). "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Id.* at 453-454 (internal quotations omitted). In determining which document constitutes the offer and which the acceptance, "[c]ourts must often look beyond the words employed in favor of a test which examines the totality of the circumstances," especially when standardized forms are used. *Challenge Machinery Co v Mattison Machine Works*, 138 Mich App 15, 21; 359 NW2d 232 (1984). For example, the *Challenge Machinery* Court determined that a plaintiff's price quotation constituted an offer based on the fact that the parties had engaged in a series of negotiations for several months before the plaintiff's issuance of the final price quotation and on the fact that the defendant accepted this offer by sending the plaintiff a purchase order that was responsive to the price quotation and made specific reference to the quotation. *Id.*

In this case, Foamade presented sufficient evidence to establish that Egren's letter of March 11 constituted the offer and Botero's March 12 sourcing confirmation letter constituted the acceptance, and to create a question of fact with regard to the terms of the parties' agreement. Egren's letter of March 11, 2002, contained two offers (Option 1 and Option 2). Each option listed terms that were material to the parties' agreement. In particular, each option included piece prices and tooling costs for both low- and high-volume production and provided for a price reduction after a certain numbers of parts had been shipped. Each option also contained a quantity term (specifically, that Foamade would provide Visteon with all the supplies needed to fulfill Ford's requirements for long-life air filters for the life of the program), and included estimated quantities for each year. The parties had been negotiating over these terms for months.

Visteon was aware that Foamade sought to enter into an agreement with it to provide supplies for the long-life air filter. Considering Egren's March 11 letter in context of the negotiations that preceded Foamade's proposal, this letter was an invitation to conclude negotiations between the parties by accepting either option set forth in the letter. Visteon's response also indicates that it regarded Egren's letter as an offer: Botero's March 12 email

notified Foamade that Visteon had "accepted" the proposal and would send a sourcing confirmation letter shortly.

Although we are not persuaded that Botero's March 12 email alone constituted Visteon's acceptance, we find that Botero's sourcing confirmation letter, sent the same day as the email, constituted Visteon's acceptance of Option 1. In contrast to the email, which simply states that Visteon "accepted" Foamade's proposal, the letter manifests Visteon's intent to be bound by the terms of Option 1 of Foamade's offer. It congratulates Foamade on having been "selected as the supplier for the long life engine air filter program for the C170" and reiterates the key terms of Option 1, including a piece price of $7.65, tooling costs of $81,000, and required productivity of three percent annually "for the life of the program." The letter also notes, "Price reductions based on capacity investment and amortization will be in accordance with your letter dated March 11, 2002 (option #1)." The letter assigns Foamade a program buyer and notes that Visteon's terms and conditions "will apply to this sourcing agreement and all subsequent commercial events."

Further, a genuine issue of material fact exists regarding the nature of the terms and conditions that Visteon accepted in its sourcing confirmation letter. In particular, a genuine issue of material fact exists with respect to whether Foamade offered and Visteon accepted an agreement for both low- and high-volume production "for the life of the program." Both of Foamade's proposed options in the March 11 letter included pricing for high-volume production, and nothing in Visteon's sourcing confirmation letter suggests that Visteon only accepted Foamade's proposal with respect to low-volume production. Viewed in the light most favorable to Foamade, the record supports the proposition that this was a requirements contract that accounted for the possibility that Visteon's requirements might change substantially with time and contemplated cost reductions as Visteon ordered and Foamade produced higher volumes. Notably, Foamade's March 11 letter stated, "All pricing presumes a contract for the life of the program on the Focus. We realize the volumes and project are dependent on Ford's production and plans, and that our contract is only for the volumes that Ford requires of Visteon." The letter also includes projected volumes for each year from 2003 through 2007.

Further, Foamade presented evidence indicating that in the March 12 letter, Visteon accepted the first option proposed by Foamade in its March 11 letter for both low- and high-volume production. In the sourcing confirmation letter, Visteon quoted the initial price of $7.65, which is the price listed in Egren's letter for low-volume production, but it also quoted the annual three-percent cost reduction "for the life of the program" and a tooling cost of $81,000, which is the total of the tooling costs included in Egren's letter for both low-volume production ($21,000) and high-volume production ($60,000). Further, Adams testified that low- and high-volume production as parts of the same program, and Egren did not recall if anyone from Visteon told him that Visteon believed it was only awarding Foamade the low-volume business and not the high-volume business. Egren testified:

> [W]hen we put this [program] together, you know, we didn't know how many years the program would continue or what the volumes would be, but assuming that it did continue, that the plan was to use the opportunity the first year to produce smaller volumes to learn and refine the process, and it turned out to be a good plan because, in fact, we were able to do that.

Egren also testified that "[n]ormally what happens," and what he anticipated in this case, was that Foamade would have an opportunity to reduce costs after the first year and would approach Visteon with those cost reductions. Botero's March 12 sourcing confirmation letter suggests that eventual price reduction was a component of the parties' agreement and understanding. After reiterating the part price, tooling costs, and productivity terms included in Egren's letter, Botero wrote, "This sourcing is valid assuming that Foamade and Visteon will work together on VA/VE opportunities to further improve cost savings." Thus, sufficient evidence was presented to create a genuine issue of material fact regarding whether Foamade and Visteon entered an agreement in which Foamade would provide supplies for Visteon's long-life air filter for the life of the program, and whether this agreement encompassed both high- and low-volume production. Visteon notes that it never issued Foamade a purchase order for the high-volume production levels. However, in light of Adams' testimony that the parties anticipated that the price would change over time and there would be more than one purchase order to reflect the price changes, the absence of a purchase order for high-volume production only shows that Visteon never ordered supplies from Foamade once its requirements reached higher volumes. The absence of a purchase order does not indicate that Visteon and Foamade did not enter into an agreement regarding high-volume production; it is equally plausible that they did and Visteon breached the agreement.

Visteon argues that the purchase order that it issued on March 19, 2002, which incorporated its standard terms and conditions, was the offer and that Foamade's performance was the acceptance. Further, Visteon claims that the terms of the agreement are embodied only in the purchase orders and its standard terms and conditions. However, this understanding of the nature of the parties' agreement does not take into consideration evidence that a broader agreement existed between the parties. Specifically, Foamade presented evidence suggesting that the parties were operating according to the terms of Option 1 of the March 11, 2002, letter, which provided that the price would be reduced from $7.65 to $5.67 after 90,000 parts had been produced at low volumes. This is a reduction of $1.98, which is the same reduction reflected in the April 1, 2004, purchase order.[4] Adams testified that pursuant to the agreement between Foamade and Visteon, the price would be reduced once production reached 90,000 parts. He also admitted that this agreement was not embodied in any of the purchase orders and, thus, the entire contract between the parties was not included in the purchase orders. Accordingly, Visteon's argument that its purchase orders and standard terms and conditions constituted the entire agreement lacks merit.

Visteon also incorporated its standard terms and conditions in its March 12 sourcing confirmation letter. In so doing, Visteon incorporated several "additional or different terms" in its sourcing confirmation letter, including the termination provision included as paragraph 24 of

[4] The piece price in the October 9, 2002, purchase order was $8.45. (It had increased from $7.65 because of an engineering change.) The piece price in the April 1, 2004, purchase order was reduced to $6.47. Egren noted that when he became aware of this price reduction, he assumed that Visteon reduced the price price by $1.98 in the April 1, 2004, purchase order in conjunction with the parties' agreement that the price would be reduced by that amount once Foamade shipped 90,000 parts.

the version of Visteon's standard terms and conditions in effect at the time it sent the sourcing confirmation letter to Foamade. The termination provision provides in relevant part:

> 24. TERMINATION
>
> (a) Unless a Purchase Order specifically states otherwise, Buyer may terminate its purchase obligations under a Purchase Order, in whole or in part, at any time by a written notice of termination to Seller. Buyer will have such right of termination notwithstanding the existence of an Excusable Delay of Section 22.

Because Foamade's March 11 letter was the offer, and Visteon's March 12 "sourcing confirmation letter" was the acceptance, then MCL 440.2207 applies.[5] MCL 440.2207 states:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> > (a) the offer expressly limits acceptance to the terms of the offer;
> >
> > (b) they materially alter it; or
> >
> > (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

The threshold question under MCL 440.2207(1) is whether Visteon's acceptance of Foamade's offer in its March 12 sourcing confirmation letter was "expressly made conditional" on Foamade's assent to the additional or different terms. In *Challenge Machinery*, *supra* at 22, this Court noted,

> At common law, the failure of the responding document to mirror the terms of the offer would have precluded the formation of a contract. The UCC, however, altered this "mirror-image" rule by providing that the inclusion of

[5] MCL 440.2207 is identical to UCC § 2-207.

> additional or different terms would not prevent the acceptance from being operative unless the acceptance was made conditional on the assent of the other party to those additional or different terms. MCL 440.2207(1).

In *Challenge Machinery*, the plaintiff issued a purchase order in response to the defendant's price quotation. The plaintiff's purchase order included the following provision: "IMPORANT: This offer consists of the terms on the front AND reverse sides hereof and buyer expressly limits acceptance to the terms hereof and no different or additional terms proposed by seller shall become part of the contract." *Id*. at 19. The *Challenge Machinery* Court determined that this purchase order contained terms that were different from those included in the defendant's price quotation. *Id.* at 22. However, this Court also noted, "The conditional assent provision has been narrowly construed to require that the acceptance must clearly reveal that the offeree is unwilling to proceed unless assured of the offeror's assent to the additional or different terms." *Id.* Because the Court found "nothing in the purchase order which illustrates [the plaintiff's] unwillingness to proceed unless it obtained the assent of the sellers," it concluded that the acceptance was not expressly conditional and thus did not preclude contract formation. *Id*.

In this case, Visteon's sourcing confirmation letter contains no language that would suggest that its acceptance was conditional. The letter specifies that Visteon's terms and conditions "will apply to this sourcing agreement and all subsequent commercial events." However, the standard terms and conditions do not constitute a conditional acceptance of Foamade's offer because they do not contain language suggesting that Visteon was unwilling to proceed absent an assurance of Foamade's assent. The language of Visteon's standard terms and conditions purports to define a purchase order sent by Visteon as an offer and the seller's commencement of performance as an acceptance. Further, Visteon's standard terms and conditions provide, "Once accepted, such Purchase Order together with these terms and conditions will be the complete and exclusive statement of the purchase agreement. Any modifications proposed by Seller are not part of the agreement in the absence of Buyer's written acceptance." However, this language would not bar the formation of an agreement between the parties based on the documents exchanged. Because Foamade's March 11, 2002, letter constitutes an offer and Visteon's sourcing confirmation letter constitutes an acceptance of Option 1, this provision of Visteon's standard terms and conditions, which contemplates that Visteon's purchase order is an offer and the seller's performance is the acceptance, would not operate to make Visteon's acceptance of Foamade's March 11 offer conditional.

Foamade also argues that because Visteon's termination provision conflicted with the "life of the program" term of the offer, if a contract existed between the parties, these conflicting terms would not become part of the contract. To support its argument, Foamade claims that the trial court should have implied a term that would be reasonable under the circumstances and that a question of fact exists regarding what constitutes reasonable duration. We disagree. Visteon's termination provision incorporates "additional or different terms" in the sourcing confirmation letter. MCL 440.2207(2) requires that "additional" terms be construed as proposals for additions to the contract and does not directly address the appropriate treatment of "different" terms. However, the *Challenge Machinery* Court determined that when the parties present different terms in their offer and acceptance, "neither provisions becomes a part of the contract and [] the provisions of the UCC will be given effect." *Challenge Machinery*, *supra* at 26.

We conclude that Visteon's termination provision is an "additional" term within the meaning of MCL 440.2207(2), rather than a "different" term that conflicts with the duration provision in Foamade's offer. Assuming that the duration term in the offer is considered to be "the life of the program," a provision giving Visteon the right to terminate the agreement at will does not conflict with this duration term. An at-will termination provision is not a duration term, but a provision giving one party the right to terminate the contract despite what would otherwise be the normal life of the contract. Thus, the parties' "duration" terms are not "different" terms; they do not cancel each other out and no question of fact is created with respect to a reasonable duration of the contract.

Accordingly, we construe Visteon's termination provision as a proposal for an addition to the contract. Because the parties are merchants, this provision becomes part of the contract unless it materially alters the contract. MCL 440.2207(2). "'[M]aterial additional terms do not become part of the contract unless *expressly* agreed to by the other party.'" *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 182; 604 NW2d 772 (1999), quoting *American Parts Co v American Arbitration Ass'n*, 8 Mich App 156, 173-174; 154 NW2d 5 (1967) (internal quotation and citation omitted). Thus, because there is no evidence that Foamade expressly agreed to the termination provision, it would not be part of the parties' contract if it constitutes a material alteration. Comment 4 of MCL 440.2207 [6] sets forth examples of clauses that "would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party":

> a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of trade allows a greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

Whether a term results in surprise or hardship is a question of fact. *American Ins Co v El Paso Pipe & Supply Co*, 978 F2d 1185, 1190-1191 (CA 10, 1992).[7] "Courts should first make factual findings as to whether a nonassenting party subjectively knew of an added term. It must then make findings of fact concerning whether that party should have known that such a term would be included." *Id*. at 1191. In determining whether a party was unreasonably surprised by an additional term, a variety of factors should be considered, including "a prior course of dealing and the number of written confirmations exchanged between the parties," the absence of industry

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[6] "Although lacking the force of law, the official comments appended to each section of the UCC are useful aids to interpretation and construction." *Shurlow v Bonthuis*, 456 Mich 730, 735 n 7; 576 NW2d 159 (1998).

[7] Because the UCC is construed to make the law among jurisdictions uniform, it is appropriate to seek guidance from other jurisdictions in applying the provisions of the UCC. *Power Press*, *supra* at 180.

custom, and "whether the addition was clearly marked on the written confirmation." *Id.* Further, "the analysis of the existence of hardship focuses on whether the clause at issue would impose substantial economic hardship on the nonassenting party." *Id*. (internal quotations and citation omitted). Thus, on remand, the trial court should determine whether Foamade was expressly aware of Visteon's incorporation of the termination provision and, if not, whether its incorporation resulted in surprise or hardship to Foamade.

Visteon also argues that Foamade's claim should be dismissed "for the separate and independent reason" that Foamade waived its claims by failing to respond to Visteon's termination of the agreement within one month, as required by Visteon's termination provision. Because questions regarding whether the termination provision was part of the parties' agreement and whether Visteon properly terminated the agreement must be decided on remand, it is better left to the trial court to address this argument.

Foamade claims that if the parties' contract gave Visteon the right to terminate at will, Visteon violated its obligation under the UCC to act in good faith. Foamade argues that Visteon's decision to terminate the contract because Foamade failed to pay testing costs, which the parties agree Foamade was not required to pay, constituted a breach of its duty to act in good faith. Under MCL 440.1203, "Every contract or duty within [the UCC] imposes an obligation of good faith in its performance or enforcement." The comment to MCL 440.1203 provides in relevant part:

> This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

This comment makes clear that Foamade has no separate claim arising from Visteon's breach of the UCC's duty of good faith. However, on remand, the trial court should address Foamade's argument that Visteon breached this duty as part of Foamade's breach of contract claim.

Finally, Foamade correctly notes that the trial court confused two emails when it ruled on Visteon's motion for summary disposition. As part of its ruling on the record, the court stated:

> The e-mail from Mr. Botero, which is what the plaintiff relies on, does not state at [sic] parties had an agreement for the life of the program. It state [sic] we will review this situation following six months of production to see if such an agreement can be reached.

The court was apparently referring to an email that Botero sent to a Foamade agent on August 22, 2001, in which Botero wrote, in part:

> Visteon and Foamade agree that minimum productivity for VP3S4U-9601-AA will be 3%/year following one full year of production for the life of the program. As Visteon expects that a greater amount of cost reduction is possible (especially as capital equipment is paid off), we will review this situation following 6 months of production to see if an LTA can be approved between the companies at a higher cost reduction value above 3%/year for at least some of the contract years.

Botero's March 12, 2002, email does not contain language regarding a review of the situation after six months to see if a long-term agreement can be reached. Instead, the March 12, 2002, email reads: "FYI, the program and I have accepted this proposal and I will be sending you a sourcing confirmation letter shortly for this part." To the extent the trial court believed that Foamade was arguing that the August 21 email constituted Visteon's acceptance and based its ruling on that misunderstanding, it erred in so doing. In any event, we find that there were genuine issues of material fact making summary disposition inappropriate.

We reverse the trial court's May 12, 2006, order granting Visteon's motion for summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette